No. 91-1853

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN D. O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in concluding that it did not constitute an illegal search for the police to look into a barn while standing in an "open field."

2. Whether the district court erred in considering petitioner's post-offense rehabilitation as a ground for a downward departure from petitioner's Guidelines sentencing range.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 28a) is reported at 950 F.2d 969.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a) was entered on December 30, 1991. A petition for rehearing was denied on February 13, 1992. Pet. App. 54a. The petition for a writ of certiorari was filed on May 13, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it and conspiracy to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to 12 months' imprisonment, to be followed by a five-year term of supervised release. The court also imposed a $10,000 fine. Pet. App. 29a-30a.

1. In October 1988, law enforcement officials in Travis County, Texas, received information that large quantities of marijuana were being grown in a barn located on a 43-acre tract of land in the county.[1] The barn was situated 156 feet (see Pet. App. 8a) from a house that was located on the property; both the house and the barn were surrounded by separate fences, as was the entire 43-acre property. The barn was owned by the parents of petitioner's co-defendant, Charles Pace. In May 1989, a different informant contacted officials and told them that a large-scale marijuana operation was being conducted in the barn. Periodic surveillance of the barn and the property was established, and the police observed petitioner, along with Charles Pace and a third co-defendant, John K. Treanor, on the property.

On June 12, 1989, two officers entered the property and looked through a hole in the barn from a vantage point outside it. They observed marijuana plants growing inside the barn. On the basis of that information, the police obtained and executed a search warrant for the barn. In the course of the search, the officers seized 796 growing marijuana plants and a prescription bottle in Pace's

[1] The facts relating to the Fourth Amendment issues in this case are stated in *United States* v. *Pace*, 955 F.2d 270 (5th Cir. 1992) (*reprinted at* Pet. App. 38a-39a), which was the appeal of one of petitioner's co-defendants.

name with marijuana seeds inside. The agents arrested petitioner, Pace, and Treanor. Searches of those individuals yielded keys to a padlock securing the entrance gate to the property and a key to a safe-deposit box at a nearby bank. Pursuant to a warrant, the agents searched a residence shared by petitioner and Treanor. There, they discovered documents, photographs, ledgers, catalogs, accounts, receipts, a small quantity of marijuana, and $5,665 in cash. A search of Pace's residence yielded a triple beam balance scale, a small quantity of marijuana, and various business and telephone records. The safe-deposit box contained a key to the gate of the property where the barn was located. Pet. App. 38a-39a.

2. a. Petitioner and his co-defendants moved to suppress the evidence discovered as the result of the search of the barn. They contended that the search warrant for the barn was invalid because the probable cause underlying the warrant application was based solely on information obtained when the officers peered into the barn from a hole in its side. The district court denied the motions. Applying the four-part analysis set forth in *United States* v. *Dunn*, 480 U.S. 294 (1987), the district court determined that the barn was located in an "open field" outside the curtilage of the home on the property, and that the defendants had no reasonable expectation of privacy in the area surrounding the barn. Pet. App. 1a-15a. Accordingly, the district court ruled that the officers did not violate the Fourth Amendment when they peered through an opening in the barn to observe marijuana growing inside.

b. At sentencing, the district court determined that petitioner's Sentencing Guidelines offense level was 22, based on the quantity of marijuana involved. The court then granted a two-level reduction for acceptance of responsibility. The total offense level of 20, combined with petitioner's Criminal History Category I, yielded a

Guidelines sentencing range of 33-41 months. The court then departed downward from the Guidelines range to impose a sentence of 12 months' imprisonment. Pet. App. 18a-21a, 30a. The court found that petitioner's acceptance of responsibility "is present to a degree substantially in excess of that which is ordinarily involved in similar crimes" and that petitioner had made "efforts at self-rehabilitation and restitution to the community." *Id.* at 19a.

3. The court of appeals affirmed the district court's denial of the suppression motion, but reversed its decision to depart downward from petitioner's Guidelines sentencing range. Pet. App. 30a, 42a-50a.

a. The court rejected petitioner's claim that he had a reasonable expectation that the interior of the barn would not be viewed by police officers because the barn was within the curtilage of the home. Pet. App. 42a-46a. The court relied on *Dunn*, which involved facts "so closely resembl[ing] the facts in this case" (*id.* at 42a) that the court of appeals characterized the similarity as "striking" (*id.* at 45a). The court held, as did this Court in *Dunn*, that the barn was not within the curtilage of the nearby residence, and it therefore did not implicate any interest recognized by the Fourth Amendment for the officers to stand outside the barn and peer into it. The court of appeals also rejected petitioner's argument that there was a "business curtilage" surrounding the barn that brought the area around the barn within the privacy interest attendant to commercial establishments. *Id.* at 46a-47a.

b. The government appealed the district court's determination to depart downward from the applicable Guidelines sentencing range. Agreeing that the district court had not identified an adequate ground to support a downward departure, the court of appeals reversed. The fact that petitioner had strong "community ties" was not

an appropriate factor, the court held, because that factor was adequately considered by the Sentencing Commission, which explicitly rejected it as a ground for departure. Sentencing Guidelines § 5H1.6. Pet. App. 32a. Following its earlier decision in *United States* v. *Reed*, 882 F.2d 147 (5th Cir. 1989), the court rejected as a basis for departure the fact that petitioner was a "worthwhile person," because to base a sentence on an individual's personal characteristics "partake[s] of the model of penology that Congress rejected in the Sentencing Reform Act." Pet. App. 33a. The court next held that petitioner's "remorse and acceptance of responsibility for the crime" were adequately taken into account by the Guidelines in providing for a reduction based on acceptance of responsibility, see Sentencing Guidelines § 3E1.1, which petitioner had received. Pet. App. 33a n.1. Finally, relying on *United States* v. *Lara-Velasquez*, 919 F.2d 946, 955 (5th Cir. 1990), the court concluded that "rehabilitative potential is not a valid basis for downward departure." Pet. App. 33a n.1.

ARGUMENT

1. Petitioner contends (Pet. 9-11) that he had a reasonable expectation of privacy in the area surrounding the barn and that the officers violated that expectation of privacy when they stood outside the barn and peered into it without first obtaining a search warrant. This Court previously rejected the same claim—on "striking[ly]" similar facts (Pet. App. 45a)—in *United States* v. *Dunn*, 480 U.S. 294 (1987).

In *Dunn*, DEA agents established surveillance of a large tract of rural property. The property was completely encircled by a perimeter fence, and there were several interior fences of barbed wire. A residence was encircled by another fence, and two barns were located approximately 50 yards from that fence. The front of the

larger of the two barns was encircled by a wooden fence, and locked, waist-high gates barred entry into the barn. Netting material stretched from the top of the wooden gates to the ceiling of the barn. Two law enforcement officials entered the property and approached the barn by crossing the perimeter fence, the barbed wire fences, and the wooden fence encircling the front of the larger barn. They then viewed the interior of the barn by shining a flashlight through the netting. Inside the barn, they saw what they believed to be a phenylacetone laboratory. The officers then obtained a warrant and entered and searched the barn. *Dunn*, 480 U.S. at 296-298.

In rejecting Dunn's Fourth Amendment challenge, this Court held that no search occurred when the officers peered into the barn without entering it. The crucial question was whether the area surrounding the barn (where the officers stood as they looked into it) was part of the curtilage of the home located on the property, or rather whether it was an "open field." The Court held that, if an "individual reasonably may expect that the area in question should be treated as the home itself," 480 U.S. at 300, because "the area harbors the intimate activity associated with the sanctity of a man's home and the privacies of life," *ibid.* (internal quotation marks omitted), the area is properly characterized as curtilage and is protected by the Fourth Amendment.[2]

[2] The *Dunn* Court identified four factors that guide the curtilage inquiry, taking care to point out that they are not to be applied mechanically but are useful to the extent they bear on the ultimate question whether the area "is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." 480 U.S. at 301. The four factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area

Petitioner does not claim that the courts below improperly applied *Dunn* in determining that the barn in this case was not within the curtilage of the home. Rather, petitioner urges (Pet. 9-10) that this case is entirely different from *Dunn*, because the barn at issue here was used as part of a commercial enterprise. Petitioner contends that because this Court has held that the Fourth Amendment applies to places of business, see *Oliver* v. *United States*, 466 U.S. 170 (1984); *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986), business premises should have a curtilage of their own.

That claim is without merit. In *Dunn*, the defendant argued that the barn at issue was part of a commercial enterprise and was entitled to Fourth Amendment protection on that basis. See 480 U.S. at 303. This Court assumed that to be true, but nonetheless held that the police conduct did not amount to a Fourth Amendment search because the officers did not enter the barn. 480 U.S. at 303-305. As in *Dunn*, the fact that the barn in this case might be entitled to Fourth Amendment protection because it was used for business purposes has no bearing on whether it violated any legitimate expectation of privacy for the authorities to peer inside the barn without entering it.

In *Dow Chemical*, the government performed aerial surveillance of a secure 2,000-acre outdoor manufacturing facility in an effort to uncover illegal conduct. This Court held that the surveillance did not constitute a Fourth Amendment search because the government did not enter the property. 476 U.S. at 237. The Court recognized that a different issue would be posed if physical entry had occurred, because "[t]he businessman, like the occupant of a residence, has a constitutional right to go

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is put; and (4) the steps taken to protect the area from observation by people passing by. *Ibid.*

about his business free from unreasonable official entries upon his private commercial property." *Ibid.* This Court's decision in *Dow Chemical*, in combination with its rejection of petitioner's "business curtilage" claim in *Dunn*, leaves no room for petitioner to argue that the barn in this case had its own curtilage that the police could not enter without a warrant.

Finally, the factual distinctions petitioner perceives between this case and *Dunn* are inconsequential. Although petitioner is correct (Pet. 7 n.6) that the closed doors to the barn in *Dunn* did not completely bar an outside observer from seeing inside, the officers in that case needed to use a flashlight to peer through a netting in order to see inside. 480 U.S. at 298. In contrast, although the officers in this case looked through a hole in the barn rather than through the doorway, they were able to see inside with the naked eye. Thus, the barn in *Dunn* was not as open to view, and the one in this case was not as closed, as petitioner suggests. Petitioner also claims (Pet. 10) that the result in *Dunn* would have been different if there had been an affirmative finding in that case (as there was here) that the barn in question was used for commercial purposes. That contention is wrong, as the Court decided *Dunn* on the express assumption that the barn was a commercial structure. 480 U.S. at 303-304.

2. Petitioner's second claim (Pet. 11-13) is that the district court had authority under the Sentencing Guidelines to depart downward because of petitioner's post-offense rehabilitation. Petitioner alleges that the courts of appeals are in conflict on the question whether post-offense rehabilitation can be a valid ground for a downward departure under the Sentencing Guidelines.

a. The court of appeals correctly determined that petitioner's post-offense rehabilitation was not a valid ground for downward departure. A sentencing court

must impose a sentence within the applicable Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b). As the court of appeals concluded, the Sentencing Guidelines already take account of self-rehabilitation through the acceptance of responsibility adjustment under Guidelines § 3E1.1. See Pet. App. 33a & n.1.

b. Contrary to petitioner's contention, there is no conflict among the circuits requiring this Court's review. In *United States* v. *Sklar*, 920 F.2d 107 (1990), the First Circuit vacated a sentence that included a downward departure based on the defendant's post-arrest, presentencing drug rehabilitation. The court held that "the mere fact of demonstrated rehabilitation between the date of arrest and date of sentencing cannot form the basis for a downward departure." 920 F.2d at 116. In the court's view, the Sentencing Commission "factored presentence rehabilitation into a two level reduction in the offense level for acceptance of responsibility." 920 F.2d at 115-116 (citing Sentencing Guidelines § 3E1.1). Although the *Sklar* court left open the possibility that "a defendant's rehabilitation might, on rare occasion, serve as a basis for a downward departure" when it is present "to a degree not adequately taken into consideration by the acceptance of responsibility reduction," 920 F.2d at 116, the defendant's rehabilitation in that case fell far short of that standard. The court therefore concluded that "[t]he downward departure [could] not stand." 920 F.2d at 117.

In *United States* v. *Harrington*, 947 F.2d 956 (1991), the D.C. Circuit likewise vacated a sentence that included a downward departure based on post-arrest drug rehabilitation. The court adopted the reasoning of *Sklar*,

holding that post-arrest, presentencing drug rehabilitation is not a valid basis for a downward departure except, perhaps, in the "extraordinary" case where a defendant's rehabilitation is of a degree not adequately taken into account by the reduction available for acceptance of responsibility. 947 F.2d at 958-963.[3]

The holdings of *Sklar* and *Harrington* are consistent with the decision in this case. All three decisions concluded that the Sentencing Guidelines adequately take account of post-arrest rehabilitation in providing for an acceptance of responsibility reduction, and each decision rejected the proposition that a downward departure may be granted merely because the defendant has been rehabilitated. While the courts in *Sklar* and *Harrington* stated that a downward departure might be authorized in an "extraordinary" case, that suggestion was dictum; neither case found the defendant's rehabilitation to be extraordinary enough to merit a downward departure, even assuming one might sometimes be authorized. See *Sklar*, 920 F.2d at 116-117; *Harrington*, 947 F.2d at 963.

Nothing in the record in this case suggests that the First Circuit or the D.C. Circuit would find petitioner's post-offense rehabilitation to be so extraordinary as to merit a downward departure. The factors relied upon by petitioner (Pet. 12-13) do not indicate "extraordinary" rehabilitation. First, petitioner's abandonment of criminal activity and criminal associations following his arrest is not surprising, and is the least society should ex-

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[3] *United States* v. *Lopez*, 938 F.2d 1293 (D.C. Cir. 1991), which petitioner also alleges (Pet. 8-9) is in conflict with the decision below, does not deal with the issue of post-arrest rehabilitation. In that case, the D.C. Circuit affirmed the district court's refusal to depart downward on account of the defendant's age, finding that the case did not present any "extraordinary" circumstances indicating that the Sentencing Guidelines had not adequately taken that factor into account. 938 F.2d at 1296.

pect from a defendant. Nor does petitioner's initiation of therapy for being a child of an alcoholic parent bear on his rehabilitation for his drug trafficking crimes. Finally, the fact that petitioner used his musical talents for charitable purposes is commendable, but is unrelated to his drug trafficking crimes.

The remaining case cited by petitioner (Pet. 8) to support his claim of conflict, *United States* v. *Maddalena*, 893 F.2d 815 (6th Cir. 1989), is readily distinguishable from the present case. In that case, the Sixth Circuit held that the district court had discretion to consider whether the defendant's "efforts to stay away from drugs" warranted a downward departure. 893 F.2d at 817. Unlike petitioner, however, the defendant in *Maddalena* began his efforts at rehabilitation long before his arrest for the offense of conviction. 893 F.2d at 817 n.1. As the D.C. Circuit emphasized, because *Maddalena* did not concern post-arrest rehabilitative efforts, the decision "may stand for no more than a determination by the Sixth Circuit that a district court has discretion to consider mitigating circumstances in an individual defendant's background in deciding whether to impose a sentence outside the guideline range." *Harrington*, 947 F.2d at 961. Thus, even assuming that *Maddalena* was correctly decided, it is inapposite here.[4]

[4] On remand in *Maddalena*, the district court refused to depart downward, and the court of appeals refused to disturb the sentence. *United States* v. *Maddalena*, 931 F.2d 57 (6th Cir.) (Table), cert. denied, 112 S. Ct. 233 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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